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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

70-203

No. ~~1745~~

WESTERN FIDELITY CORPORATION, ET AL.,
Petitioners,

VERSUS

INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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June, 1971

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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STATEMENT OF THE CASE

Petitioner commenced an action in the United States District Court for the Western District of Oklahoma invoking the jurisdiction of that court on the ground of diversity of citizenship between petitioners, corporations organized under the laws of Oklahoma and having their principal place of business in the City of Oklahoma City, in the Western District of Oklahoma, and respondent, a corporation organized under the laws of the State of Pennsylvania and having its principal place of business in the City of Philadelphia in said State.

The suit was to recover on a "Blanket Honesty Bond" issued by respondent to petitioners which insured,

> "against any loss of money or other property * * *, through any fraudulent or dishonest act or acts committed by any of the employees as defined in section 3, acting alone or in collusion with others * * *."

The defense of the respondent was that there were no fraudulent or dishonest acts by any of the employees of petitioners which would entitle petitioners to recover on the bond.

All issues and contentions raised by petitioners, many of which are reiterated under the caption "Questions Presented" commencing at page 2 of the petition, were considered by the trial court and evidence was received on all of the issues presented by petitioners.

The Findings of Fact and Conclusions of Law of the District Court for the Western District of Oklahoma, identified as Appendix A attached to the petition, include detailed findings on every issue presented. Such findings and conclusions were adverse to petitioners.

Petitioners have not caused the record to be transmitted to the Clerk of this Court, nor does the petition assert absence of proof to support the findings and conclusions of the court. As in the Court of Appeals for the Tenth Circuit, complaint only is made by petitioners as to the burden of proof.

ARGUMENT AND AUTHORITIES

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit (styled *Western Fidelity Corporation, et al., plaintiffs-appellants* v. *The Insurance Company of North America, defendant-appellee*) was dated February 2, 1971, and reported at 437 F.2d 752 and published on April 12, 1971. Petition for Rehearing which was not timely filed was denied March 2, 1971 (Appendix to Petition). The Petition for a Writ of Certiorari was docketed May 24, 1971.

The petition in the case at bar therefore was not filed or docketed within ninety days after the entry of the opinion and judgment of the Court of Appeals for the Tenth Circuit as provided by Title 28, U.S.C. 2101, par. c, which provides in part:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. * * *"

There appears to be no authority that would justify a conclusion that the statutory period of ninety days may be tolled by the filing of a Petition for Rehearing in the Court of Appeals out of time.

The issues sought to be raised by petitioner in this proceeding were involved in the appeal by petitioners from the judgment of the United States District Court for the Western District of Oklahoma to the Court of Appeals for the Tenth Circuit. The following is from the opinion in *Western Fidelity Corporation, et al., plaintiffs-appellants* v.

Insurance Company of North America, defendant-appellee (C.A. 10-1971), 437 F.2d 752:

> "As concerns the so-called interlocking directorates of Western and Deering Associates, we note that as of the date of the execution of the operational contract between the two companies, namely July 21, 1961, there was only one person connected with Deering Associates who was also in any way associated as such with Western. In any event, though the evidence and certainly the inferences properly deducible therefrom are in conflict, still there is evidence, and much of it, to support the trial court's findings and conclusions that the operational contract between Western and the Insurance Company is valid and that Western's employees were not guilty of fraudulent and dishonest acts. Such being the state of the record the trial court's finding in this regard must be upheld." (Citing authorities.)

It is clear therefore that in the case at bar the United States District Court for the Western District of Oklahoma and the United States Court of Appeals for the Tenth Circuit have reviewed the findings of fact.

In *Graver Tank and Mfg. Co.* v. *Linde Air Products Company* (1949), 336 U.S. 271, 69 S.Ct. 535, 93 L.Ed. 672, it was held:

> "The rule requires that an appellate court make allowance for the advantages possessed by the Trial Court in apprising the significance of conflicting testimony and reverse only 'clearly erroneous' findings. These are manifestly supported by substantial evidence and the Court of Appeals found them supported by the weight of the evidence—indeed found the evidence to warrant support of the patent even in matters

not found by the trial court. A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

CONCLUSION

It is respectfully submitted that the petition does not present any of the grounds enumerated in Rule 19 of the revised rules of this Court and that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

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